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Scope Of Employment: Driving Home In Company Vehicles

*Phillips v. Cook*¹

Harris and Phillips, defendants in this personal injury action, were partners in a used car business. Harris was driving home by the most direct route, in an automobile belonging to the partnership and bearing dealer plates, when he negligently collided with the plaintiff. Under their oral partnership arrangement, Harris was authorized to use partnership vehicles for transportation to and from his home so that, when the occasion arose, he would be able to demonstrate or sell the vehicle and otherwise conduct partnership business after leaving the lot at night and before returning the next day. The car he was driving was for sale at any time, although when the accident occurred, there was no evidence that the car bore any sign or advertisement other than the dealer tags which would indicate this. Further, although Harris had no regular hours, no conclusive evidence was adduced that tended to show he had planned to conduct business after arriving home on the date of the accident. The jury found that Harris was acting within the ordinary course of the business of the partnership, and both defendants were accordingly held jointly and severally liable. Harris did not challenge the trial court's finding. On appeal, the other partner, defendant Phillips, contended that there was not sufficient evidence on which a jury could find that Harris was acting within the scope of partnership business at the time of the accident.

The Maryland Court of Appeals, in a 5-2 decision, held that there was sufficient evidence to support the jury's finding, since the facts indicated that the use of the car by Harris was beneficial and incidental to the partnership arrangement.

The liability of a partnership for negligent acts of its members is limited to acts committed "in the ordinary course of . . . [its] business."² This limitation, often used interchangeably with "scope of employment" or "course of employment," is elusive in meaning, flexible in application,³ and "not susceptible of . . . [successful] analysis."⁴ As Professor Mechem states: "It is believed that in fact the judicial process in course-of-employment cases is not unlike that in 'causation' cases. In novel instances, the court decides on the basis of intuition or hunch; where similar instances increase, there is a tendency for a rule to crystallize."⁵ A similar process of development is apparent in cases applying this course of employment formula to the negligent acts of an employee committed while driving home in his employer's vehicle.

1. 239 Md. 215, 210 A.2d 743 (1965).

2. MD. CODE ANN. art. 73A, § 13 (1957). This is § 13 of the Uniform Partnership Act.

3. PROSSER, TORTS § 69, at 472-73 (3d ed. 1964). In *Schloss v. Silverman*, 172 Md. 632, 192 Atl. 343 (1937), the Maryland Court of Appeals equated the "course of the business" test of the liability of a partnership with the "scope of employment" test of liability for principal and agent.

4. MECHEM, AGENCY § 366 (4th ed. 1952).

5. *Id.* at § 373.

Several well-defined rules have emerged to deal with the variations within this limited factual setting.

In the vast majority of jurisdictions, the use of an employer's automobile by an employee raises a rebuttable presumption that the employee was acting within the scope of employment.⁶ Absent special circumstances, however, the general rule is that an employer is not liable for the negligent acts of his employee if committed while driving the vehicle to his home.⁷ The cases typically state as grounds for such a holding that the employee's use of the vehicle was singularly for the personal convenience of the employee,⁸ conferred no benefit on the employer,⁹ was not within the control, management or direction of the employer,¹⁰ did not facilitate or expedite the employer's business,¹¹ or was without the consent of the employer.¹² If any one or more of these factors are present, the employer is vindicated.

On the other hand, if the employer has assigned the employee a special errand to perform on his way home, the employer will be held liable until the errand has been performed, even though the errand is merely incidental to the trip home.¹³ But if a collision occurs while the employee is continuing home after having completed the errand, the decisions are not in harmony.¹⁴

When the employer supplies a vehicle to the employee as an inducement to enter into employment, the employee is generally held to be acting within the scope of employment while driving home.¹⁵ However, whether this fact alone requires such a holding is not clear. In cases where it has been found that the vehicle was an inducement to the

6. See, e.g., *Ball v. Hail*, 196 Ark. 491, 118 S.W.2d 668 (1938); *Southern Gas Corp. v. Cowan*, 89 Ga. App. 810, 81 S.E.2d 488 (1954); *Home Laundry Co. v. Cook*, 277 Ky. 8, 125 S.W.2d 763 (1939); *Grier v. Rosenberg*, 213 Md. 248, 131 A.2d 737 (1957). See generally 9B BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW § 6065 (1954). But see *Beckwith v. Standard Oil Co.*, 281 S.W.2d 852, 855 (Mo. 1955), which criticizes the presumption as attaching undue weight to the employer's ownership of the vehicle.

7. See generally Annot., 52 A.L.R.2d 350 (1957). Also see RESTATEMENT (SECOND), AGENCY § 229, comment *d* (1958); 5 BLASHFIELD, *op. cit. supra* note 6, § 3041.

8. *Stenger v. Mitchell*, 70 Ga. App. 563, 28 S.E.2d 885 (1944); *Keck's Adm'r v. Louisville Gas & Elec. Co.*, 179 Ky. 314, 200 S.W. 452 (1918).

9. *Brown v. Bond*, 190 Miss. 774, 1 So. 2d 794 (1941); *McLamb v. Beasley*, 218 N.C. 308, 11 S.E.2d 283, 286 (1940); *Kunkel v. Vogt*, 354 Pa. 279, 47 A.2d 195 (1946).

10. *Cooley v. Tate*, 87 Ga. App. 1, 73 S.E.2d 72 (1952); *Swanson Elec. & Mfg. Co. v. Johnson*, 79 Ind. App. 321, 138 N.E. 262 (1923).

11. *Mauchle v. Panama-Pac. Int'l Exposition Co.*, 37 Cal. App. 715, 174 Pac. 400 (1918); *Donnelly v. Yuille*, 197 App. Div. 59, 188 N.Y.S. 603 (1921); *Gewanski v. Ellsworth*, 166 Wis. 250, 164 N.W. 996 (1917).

12. *Frick v. Bickel*, 115 Ind. App. 114, 54 N.E.2d 436 (1944); *Simmons v. James*, 210 Miss. 515, 49 So. 2d 839 (1951); *Arthurs v. Citizens' Coal Co.*, 37 Ohio L. Abs. 438, 47 N.E.2d 654 (1942); *Feldtman v. Russak*, 141 Wash. 287, 251 Pac. 572 (1926).

13. *Gordon v. Bleleck Auto. Co.*, 233 S.W. 265 (Mo. 1921). See generally SEAVEY, AGENCY § 87 (1964).

14. For cases holding the employer liable, see *Brimberry v. Dudfield Lumber Co.*, 183 Cal. 454, 191 Pac. 894 (1920) (dissent argued that employer should not be held); *Re-Mark Chemical Co. v. Ross*, 101 So. 2d 163 (Fla. 1958). *Contra*, *Red's Elec. Co. v. Beasley*, 272 Ala. 200, 129 So. 2d 676 (1961); *Kunkel v. Vogt*, 354 Pa. 279, 47 A.2d 195 (1946). See generally 5 BLASHFIELD, *op. cit. supra* note 6, § 3041.

15. See generally 5 BLASHFIELD, *op. cit. supra* note 6, § 3041; RESTATEMENT (SECOND), AGENCY § 229, comment *d* (1958); Note, 24 TENN. L. REV. 241, 244 (1956).

employment contract, the courts have generally made additional findings that the use of the vehicle was advantageous or beneficial to the operation of the employer's business.¹⁶ Yet some courts seem to indicate that such a contract will be sufficient evidence in itself to establish the employer's liability.¹⁷ However, since no reason has been given to explain why a contractual obligation to supply a vehicle should alone support the conclusion that the employer is liable, and since most cases do advance additional grounds on which to hold the employer, it would seem that a more limited significance should be attached to such a term in the employment contract. Perhaps the majority of courts are saying nothing more than that the contractual obligation to provide a vehicle permits a strong, but not conclusive, inference that its use benefits the employer's business and is therefore within the employer's course of business.¹⁸

It should be noted that the Maryland Court of Appeals in *Phillips v. Cook* did not rest its holding solely on the partnership contract. As additional reasons, the court stated that the car which Harris drove was for sale at any time, that Harris was always on call at his home, that he frequently returned to the lot at night, that he had no regular hours, and that he often conducted business on his way to and from the lot.¹⁹ From facts such as these, courts generally will conclude that the employee was acting within the scope of his employment because his use of the car facilitated, expedited and thus benefited the employer's business. Typically stated, the benefit rule is: "[W]here a master places at the disposal of his servant an automobile to be used by the servant in going to and from his work, and where the transportation is beneficial to both, the relation of master and servant continues while the automobile is used for such purposes. . . ."²⁰

A most common application of the benefit rule arises in cases involving a traveling salesman who uses the employer's vehicle to cover his sales territory and who returns home directly from his sales route. In returning home directly from his sales route, the employee has generally been held to be within the scope of employment.²¹ The same result obtains with deliverymen who drive their employer's vehicle directly home after the last delivery and continue on their route the next

16. *Ely v. Rice Bros.*, 26 Tenn. App. 19, 167 S.W.2d 355 (1942). See also *Halsey v. Metz*, 93 S.W.2d 41 (Mo. App. 1936); *Byrnes v. Poplar Bluff Printing Co.*, 74 S.W.2d 20 (Mo. App. 1934), *rev'd on other grounds*; *McLamb v. Beasley*, 218 N.C. 308, 11 S.E.2d 283 (1940) (dictum); dissent intimates that repeated use of the vehicle by the employee raises an implied term in the employment contract.)

17. See, e.g., *Ely v. Rice Bros.*, 26 Tenn. App. 19, 167 S.W.2d 355, 358 (1942).

18. In *Halsey v. Metz*, 93 S.W.2d 41, 44 (Mo. App. 1936), the court said that such an inducement to the employment arrangement merely *indicates* that the operation of the vehicle is part of the master's work. It is inferable from this that such an employment arrangement is not conclusively determinative of the employer's liability. See also 24 TENN. L. REV. 241.

19. 239 Md. at 221, 210 A.2d at 747.

20. 5 BLASHFIELD, *op. cit. supra* note 6, § 3041, at 390. See generally Note, 16 OKLA. L. REV. 181, 183 (1963).

21. *Krousel v. Thieme*, 13 La. App. 680, 128 So. 670 (1930); *Burt Corp. v. Crutchfield*, 153 Okla. 2, 6 P.2d 1055 (1931); *Collin County Motor Co. v. Howard*, 121 S.W.2d 460 (Tex. Civ. App. 1938). See generally SEAVEY, *op. cit. supra* note 13, § 87 and Annot., 52 A.L.R.2d 350, 365 (1957).

day.²² The courts' usual reason for holding the employer liable in these traveling employee cases is that the elimination of the time-consuming procedure of having an employee report to his place of business, when such is not necessary to the conduct of the business, benefits the employer's business by enabling the employee to work longer hours.²³

When the employer supplies the employee with a vehicle so that he can respond to emergency calls at any time, the employee is generally held to be within the scope of employment when driving home from work.²⁴ Since the employee must keep the employer's vehicle at home to assure prompt response to a call, the employee is acting for the employer in getting the vehicle home; and since the employee is constantly subject to call, he is held to be within the direction and control of the employer, and a fortiori within the scope of employment.²⁵

That an employee has some business function to perform after he has driven the company car to his home has been sufficient grounds for holding the employer liable under the benefit theory.²⁶ Similarly, if it is the employee's responsibility to garage the vehicle at his home, he may be found to be acting within the scope of employment on the way home.²⁷

A number of cases have reasoned that if the use of the employer's vehicle permits the employee to arrive at work earlier than he otherwise could, the employer thereby receives a sufficient benefit to hold him liable for the employee's accidents on his way home.²⁸ These particular cases approach the borderline of what the courts will consider a benefit to the employer, as distinguished from a mere personal accom-

22. *C. J. Horner Co. v. Holland*, 207 Ark. 345, 180 S.W.2d 524 (1944); *Helena Wholesale Grocery Co. v. Bell*, 195 Ark. 435, 112 S.W.2d 416 (1938); *Davies v. Hearn*, 45 Ga. App. 276, 164 S.E. 273 (1932). See also *Langston v. Harper*, 216 Ark. 778, 227 S.W.2d 973 (1950).

23. See, e.g., *Helena Wholesale Grocery Co. v. Bell*, *supra* note 22, at 417; *Kish v. California State Auto Ass'n*, 190 Cal. 246, 212 Pac. 27 (1922) (dictum).

24. *Nelson v. Johnson*, 264 Ala. 422, 88 So. 2d 358 (1956); *Southern Gas Corp. v. Cowan*, 89 Ga. App. 810, 81 S.E. 2d 488 (1954); *Trachtenberg v. Castillo*, 257 S.W. 657 (Tex. Civ. App. 1923). See *McLean v. Chicago, G.W.R. Co.*, 3 Ill. App. 2d 235, 121 N.E.2d 337, 341 (1954), where the court said that such a case was "not a going to or from work case, since [the employee] was subject to call to work at all times wherever he was. . . ." See also RESTATEMENT (SECOND), AGENCY § 233, comment c (1958); 5 BLASHFIELD, *op. cit. supra* note 6, § 3041, at 392.

25. See, e.g., *Southern Gas Corp. v. Cowan*, *supra* note 24.

26. *Hall v. Cassell*, 79 Ga. App. 7, 52 S.E.2d 639 (1949) (employee was told to try to sell employer's automobile while he had it at home); *Sam Horne Motor & Implement Co. v. Gregg*, 279 S.W.2d 755 (Ky. 1955) (salesman took car home to demonstrate to prospective customers); *Barber v. Jewel Tea Co.*, 252 App. Div. 362, 300 N.Y.S. 302 (1937), *aff'd*, 278 N.Y. 540, 16 N.E.2d 94 (1938) (employee had scheduled meeting with a superior at his home). See generally FERSON, AGENCY § 59, at 85 (1954). See also 5 BLASHFIELD, *op. cit. supra* note 6, § 3041, at 390, where it is indicated that the vehicle must have been furnished for the specific purpose of enabling the employee to respond to night calls. *But see Swanson Elec. & Mfg. Co. v. Johnson*, 79 Ind. App. 321, 138 N.E. 262 (1923).

27. *Vitelli v. Minutoli*, 118 Cal. App. 120, 4 P.2d 818 (1931); *Hall v. Puente Oil Co.*, 47 Cal. App. 611, 191 Pac. 39 (1920) (dicta). *But see Mauchle v. Panama-Pac. Int'l Exposition Co.*, 37 Cal. App. 715, 174 Pac. 400 (1918), where the employee did not ordinarily take the vehicle home and, although the employee garaged the vehicle, the court held that the employer received no benefit thereby because he had his own garaging facilities.

28. *Blair v. Greene*, 247 Ala. 104, 22 So. 2d 834 (1945); *Depue v. George P. Salmon Co.*, 92 N.J.L. 550, 106 Atl. 379 (1919); *Wilson v. Edwards*, 138 W. Va. 613, 77 S.E.2d 164 (1953). See generally Annot., 52 A.L.R.2d 350, 370 (1957).

modation for the employee. Thus, if the use of the vehicle does not really facilitate the employer's business by enabling the employee to perform his work in a way which, without the use of the vehicle, he could not so perform, it is held that the employer has not benefited and is therefore not liable.²⁹

For a court to find that an employer has benefited, it generally seems necessary that a showing be made that the employee's use of the vehicle facilitates the master's business in an objective, tangibly measurable way, *i.e.*, a savings in time or money. Therefore, the infrequently advanced contention that the benefit theory should apply where the employer's generosity in permitting the employee the use of the car has infused their business relation with a spirit of harmony, cooperation and good will is rejected, because the benefits of the loyalty engendered thereby are not objectively measurable in a legal sense.³⁰

There is also a further qualification to the application of the benefit rule. Should an employee, who might otherwise be acting within the scope of employment in driving home, deviate from the direct homeward route to pursue personal interests unrelated to the employer's business, the employer is relieved of liability,³¹ unless the deviation was so minor and incidental as to be insignificant.³² However, an employee who has substantially deviated from the direct route will, upon his return to the direct route, be held to have resumed his employment.³³

In several cases, litigants have attempted to limit the application of the benefit rule by contending that the employee, in driving home, was not actuated by a purpose to serve his employer.³⁴ Usually, the fact that the employee's immediate intention is merely to get home does not absolve the employer, as long as the employee's use of the vehicle meets the requirements of the benefit rule.³⁵ To hold otherwise would open a Pandora's box of nice inquiries into the specific intentions of the employee and thus virtually give the employee the option of responding with the most expedient answer about his state of mind.³⁶

29. *Mauchle v. Panama-Pac. Int'l Exposition Co.*, 37 Cal. App. 715, 174 Pac. 400 (1918); *Donnelly v. Yuille*, 197 App. Div. 59, 188 N.Y.S. 603 (1921).

30. *Gewanski v. Ellsworth*, 116 Wis. 250, 164 N.W. 996 (1917). *But cf.* *Ackerson v. Erwin M. Jennings Co.*, 107 Conn. 393, 140 Atl. 760 (1928), which held that an employee who had been supplied a car for the special purpose of attending a good will dinner, which was intended to promote harmony and cooperation among the employer and employees, was within the scope of employment while on the way home from that dinner.

31. *Hall v. Puente Oil Co.*, 47 Cal. App. 611, 191 Pac. 39 (1920); *Beckwith v. Standard Oil Co.*, 281 S.W.2d 852 (Mo. 1955); *Lytle v. Union Gas & Elec. Co.*, 24 Ohio App. 314, 157 N.E. 804 (1926). See generally Annot., 52 A.L.R.2d 350, 375 (1957).

32. See, *e.g.*, *Hubbard v. Lock Joint Pipe Co.*, 70 F. Supp. 589 (D. Mo. 1947); *General Foods Corp. v. Coney*, 35 Ala. App. 492, 48 So. 2d 781 (1950).

33. See, *e.g.*, *Gayton v. Pacific Fruit Express Co.*, 127 Cal. App. 50, 15 P.2d 217 (1932).

34. See, *e.g.*, *McGrath v. Wehrle*, 233 Mass. 456, 124 N.E. 253 (1919); *McKeage v. Morris & Co.*, 265 S.W. 1059 (Tex. Civ. App. 1924) (dictum).

35. *Hubbard v. Lock Joint Pipe Co.*, 70 F. Supp. 589 (D. Mo. 1947). See generally RESTATEMENT (SECOND), AGENCY § 236, comment b (1958).

36. *Cf.* *Phillips v. Cook*, 239 Md. 215, 226, 210 A.2d 743, 750 (1965), where the dissent takes the position that the employer's liability should be determined by inquiring into the servant's purposes at the time of the accident. To rest liability solely on this consideration would amount to a repudiation of the benefit rule.

Professor Mechem criticizes such an intent test and supplies a more practicable solution:

In other words we may have to determine his intent from what he was doing, rather than as an independent factor. This rather casts doubt on the value of "intent" as a clue or test. The difficulty can perhaps be eliminated if we adopt a statement like this: the servant following a pattern designed to achieve the master's ends will be taken to be intending to serve the master unless for the time being he is conspicuously and unmistakably seeking a personal end.³⁷

Thus, if the employer benefits by having his employee take the car home, and the employee does follow a direct route home, the employee will be held to be acting within the scope of employment, notwithstanding the fact that the employee's specific intention may be simply to get home for a good meal.

One aspect of the present case, *Phillips v. Cook*, however, went beyond the general case law developments in this particular area and presents a problem that, while not totally unique, has not been adequately identified and discussed where it has existed in past cases. The dissent in *Phillips* seized upon this problem when it distinctly pointed out the lack of any conclusive proof that Harris, on this particular occasion, had contemplated any business use of the car before returning to work the next day.³⁸ Assuming no such business use was contemplated on the day of the accident, it could be said that the partnership was deriving no actual benefit when the automobile was being driven home, but only a possibility of benefit or a potential benefit which would accrue only if an unforeseen contingency arose, requiring the business use of the car on the night of the accident. In essence, the dissent argues that a distinction between an actual and potential benefit should be made. The majority can be said to have concluded the contrary, *sub silentio*. The majority has probably taken the sounder position in disregarding this distinction. The mere availability of the automobile to facilitate a spot sale or to provide for some other unforeseen business contingency is certainly in the best interest of the partnership; and if Harris, as a partner, acted to insure that availability by driving the vehicle home, there seems no sensible reason why the partnership should not be held liable under the benefit rule.³⁹

37. MECHEM, *op. cit. supra* note 4, § 368, at 248.

38. 239 Md. 215, 224, 210 A.2d 743, 749 (Hammond, J., dissenting). See also RESTATEMENT (SECOND), AGENCY § 235 (1958).

39. The argument of the dissent is further weakened by a close examination of its authorities. The force of the RESTATEMENT (SECOND), AGENCY § 238, comment *b* (1958), on which the dissent relies, is both mitigated and attenuated when read in light of the discussion of scope of employment problems elsewhere: Compare § 238, comment *d* and § 229, comment *d*. Furthermore, in assigning 51 A.L.R.2d 120, 128-30, as authority, the dissent failed to note that the section applied to cases where the use was contrary to instructions by the employer. The dissent in citing 53 A.L.R.2d 631, 655-61, which also is not directly in point, failed to note the annotations commencing on p. 663, which are directly in point and contrary to its argument. Similarly, the cases cited by the dissent also reveal a lack of factual identity with the case before the court.

Finally, it should be noted that legislation extant in a number of states renders moot this entire legal problem. Under so-called permissive use statutes, an owner of a vehicle is "liable for injuries to third persons caused by the negligence of any person . . . , who is operating the car on the public highway with the owner's consent."⁴⁰ Where such legislation is in effect, an inquiry into the doctrine herein discussed is avoided.⁴¹ Maryland has no such statute, but with the decision in *Phillips v. Cook*, the benefit rule is made sufficiently broad to be nearly the judicial equivalent of such legislation as to employer's liability.

40. PROSSER, TORTS § 72, at 500 (3d ed. 1964). See generally 2 HARPER & JAMES, TORTS §§ 26.10, 26.16 (1956). Also see RESTATEMENT (SECOND), AGENCY § 238, comments *b, d* (1958).

41. CRANE, PARTNERSHIP § 54, at 281 (1952), which states that under a permissive use statute "partnership liability results from operation for nonpartnership purposes by a partner with consent of his co-partner."